



STATE OF ARKANSAS
ATTORNEY GENERAL
LESLIE RUTLEDGE

Opinion No. 2015-095

November 30, 2015

The Honorable Jeremy Hutchinson
State Senator
201 East North Street
Benton, Arkansas 72015

Dear Senator Hutchinson:

I am writing in response to your request for an opinion on three questions pertaining to the Arkansas Freedom of Information Act (FOIA). Specifically, you ask:

1. When it comes to digital files on a computer or cell phone, what constitutes storage?
2. Would a voicemail message on a cell phone need to be made available immediately or is it subject to the three-day period for active use or storage?
3. Is simply having to open a document or application on a computer or cell phone and then push print or play outside of the scope of reasonable access?

RESPONSE

I take your questions as asking whether the FOIA gives custodians three business days to disclose a nonexempt public record that is stored on a computer or a cell phone. Because the analyses for your questions heavily overlap, I will begin by explaining the FOIA's general rules governing the timing of the custodian's response and then turn to address your specific questions.

The leading commentators on the FOIA have—with reference to the FOIA’s text, Arkansas case law, and this office’s opinions—summarized the FOIA’s requirements regarding the time of the custodian’s response:

The FOIA contemplates that when a request is made in person, the records will be made available immediately unless they are in active use or storage. Section 25-19-105(a) states that “all public records shall be open to inspection and copying...during the regular business hours of the custodian of the records.” The term “regular business hours” refers to the hours that the entity usually operates, not to the “office hours” of the custodian. Under subsection (d)(1), “reasonable comforts and facilities” must be provided for the requester, and, under subsection (e), a specific date must be set for inspection within three working days if the record is in “active use or storage, and therefore, not available at the time a citizen asks to examine it.”¹

The commentators go on to explain that most offices are not set up to provide for immediate access and that most records are in active use or storage:

While a system of oral requests and immediate demands to inspect records makes sense for those public offices set up in a manner to provide instant access, *e.g.*, a circuit clerk’s office, it is unrealistic for most entities covered by the FOIA. ***Because the records of most bodies are, at any given time, in either active use or storage, instant access generally is not available, and the agency then has three working days under subsection (e) to make the records available.***²

Summarizing this office’s opinions, the commentators also explain what custodians and requesters should expect when, for various reasons, a record cannot be produced immediately even though it is not in active use or storage:

Moreover, the Attorney General has recognized that the requirement of immediate access “must be viewed in light of the particular circumstances surrounding each FOIA request.” For example, a

¹ John J. Watkins & Richard J. Peltz, *The Arkansas Freedom of Information Act* 273–74 (Arkansas Law Press, 5th ed., 2009) (internal citations omitted).

² *Id.* at 274 (emphasis added) (*citing* Op. Att’y Gen. Nos. 2000-059, 80-26, 2006-093, 96-334, 95-225).

search for a “voluminous amount” of records may take some time, or the custodian may need “to review the records (perhaps in consultation with legal counsel) in order to determine if there is any exempt information contained therein which must be excised prior to disclosure.” In these and similar situations, the custodian “should...be afforded a reasonable time in order to comply with an FOIA request.” This period “may or may not equal a three-day interval, depending on the circumstances of a particular request.”³

We can distill the foregoing rules into the following propositions:

1. Generally, custodians must disclose nonexempt public records at the time a citizen makes the request. But if the records are in active use or storage, custodians have three business days to disclose the records.
2. Most records are in active use or storage.
3. Custodians should not adopt a policy of waiting, as a matter of course, to disclose records on the third business day.⁴ The text of the FOIA requires that the record to be disclosed “*within*” three business days. The custodian should seek to disclose the record as soon as practicable within the three-day window.
4. Personnel records and employee-evaluation records are never available immediately upon request. This is because the custodian must follow special notice procedures when a request is made for these records.⁵

Summarizing the practical effect of these rules, the commentators provide the following recommendation: “*To avoid unnecessary confrontation, the requester*

³ *Id.* at 274–75.

⁴ Op. Att’y Gen. 2006-093 (“Certainly, there is no basis in the FOIA for any standard policy of waiting for three days to respond to the FOIA requests”); *see also* Op. Att’y Gen. 1996-354 (opining that a school board’s standard 48-hour policy for complying with FOIA requests was contrary to the FOIA).

⁵ Ark. Code Ann. § 25-19-105(c)(3); *see generally* Op. Att’y Gen. 95-225 (explaining the timeframe associated with a request for personnel or employee-evaluation records).

should simply ask that the records be made available within three working days and remind the agency of the statutory deadline.”⁶

We are now in a position to apply these rules to your three specific questions.

Question 1—When it comes to digital files on a computer or cell phone, what constitutes storage?

Neither the text of the FOIA nor the relevant case law provides an answer to this question in the abstract. Thus, the term “storage” must be understood in its ordinary, common-sense meaning. In general, *storage* means “the action or method of storing something for future use.”⁷ With reference to electronic data, *storage* means “the retention of retrievable data on a computer or other electronic system; memory.”⁸

I agree with the commentators noted above who said that *most* records are in active use or storage. I would add that this statement is true of both paper and electronic records. The only material difference between paper and electronic records is the *manner* in which the records are stored—not in *whether* they are being stored. If those electronic files are requested and they qualify as nonexempt public records, custodians have three business days to disclose the records.

Question 2—Would a voicemail message on a cell phone need to be made available immediately or is it subject to the three-day period for active use or storage?

Please see my response to Question 1. Especially in light of the lack of any additional factual information concerning the specific circumstances of a particular FOIA request, it would be inappropriate to provide further comment or analysis.

Question 3—Is simply having to open a document or application on a computer or cell phone and then push print or play outside of the scope of reasonable access?

⁶ Watkins & Peltz, *supra* note 1, at 274–75 (emphasis added).

⁷ New Oxford American Dictionary 1718 (Oxford Univ. Press, 2010).

⁸ *Id.*

I take this question as another way of asking whether digital files must be disclosed immediately on request or within three business days. Accordingly, please see my response to Questions 1 and 2.

Additionally, I will add that this question seems to presuppose that the dispositive factor in determining whether a record is in active use or storage is how difficult it is to access the record. Nothing in the text of the FOIA or in Arkansas's appellate case law supports such a presupposition.

Further, there are good grounds to think this presumption is false. For, presumably, when a record is in active use, there is no difficulty in making a copy of the record to disclose to the requester. After all, the record is readily at hand. Thus, if "difficulty-of-reproduction" were the dispositive test, then custodians would have to immediately disclose records that were in active use. But the FOIA does not require such a scenario, in part because this might disrupt the agency's performance of its duties. In 2011, the legislatively-created FOIA Electronic Records Study Commission commented on the need to balance the convenience associated with accessing electronic information, on the one hand, with agencies' need to carry out their primary missions, on the other hand: "[A]gencies have limited resources and responding to FOIA requests is typically not the responding authority's primary mission.... In other words, the user convenience opportunities of electronic records can only be taken so far without unduly imposing upon agencies' time and manpower."⁹

Sincerely,



Leslie Rutledge
Attorney General

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⁹ Report of the Electronic Records Study Commission & Recommendations for Amendments to the Arkansas Freedom of Information Act (December 15, 2000), p. 28.